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No. 90-1537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Does *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), prevent a party from collaterally attacking an adverse judgment that other parties have successfully appealed, where that party deliberately chose not to appeal the judgment?

RULE 29.1 LIST

Johnson Controls, Inc. has no parent. It holds a controlling interest in the following companies which are not wholly-owned subsidiaries: Technotrim, Inc.; Trim Master, Inc.; Johnson Controls (NZ) Ltd.; Naue-JCA Verwaltungsgesellschaft mbH; Naue-JCA Objeckt Bochum GmbH & Co. KG; Johnson Controls (M) SDNBHD; Naue GmbH & Co. KG; Vintec Company; Yokogawa Johnson Controls Corp.; Johnson Yokogawa Corp.; Pannabco; Pannesma; Lapeer Trading Co.; IllumElex Corporation; Seating Systems Technology, Inc.; Hyperion Corp.; Setex, Inc.; Naue & Naue GmbH; Eurosit S.A.; Johnson Controls Saudi Arabia Ltd.; and Integrated Communication Systems.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Johnson Controls, Inc., by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *Local 322, Allied Industrial Workers v. Johnson Controls, Inc.*, 921 F.2d 732 (CA7 No. 90-1259, Jan. 11, 1991).

COUNTERSTATEMENT OF THE CASE

Contrary to the impression conveyed by the petition, the issue presented in this case is not the legality under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, of Johnson Controls' former fetal protection policy, a question recently decided by this Court in *International Union, UAW v. Johnson*

Controls, Inc., 111 S. Ct. 1196 (1991). Johnson Controls is, of course, complying with the Court's decision in the *UAW* case and has discontinued its fetal protection policy at all its battery plants, including the plant involved in this proceeding.

The *only* issue presented on review is whether the doctrine of res judicata was appropriately applied to the unique facts of this case. Specifically, the narrow question is whether a party that deliberately chose *not* to appeal an adverse judgment can, in order to obtain retrospective relief, collaterally attack that judgment based on the reversal obtained by other parties who did seek review. This Court has already directly answered this question in the negative in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

The Proceedings Below

The AIW represents certain employees at Johnson Controls' battery plant located in Milwaukee, Wisconsin. In March 1985, the AIW commenced this action, in which it alleged that Johnson Controls' fetal protection policy violated Title VII. At that time, the similar action brought by the United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), which was recently before this Court, was already pending before the same district judge. Pet. App. 2a. The AIW was well aware of the pendency of the *UAW* case when it filed its separate action. AIW Civil Cover Sheet at 2 (Mar. 19, 1985).

As this Court knows, summary judgment was entered in favor of Johnson Controls in the *UAW* case and the UAW appealed to the Seventh Circuit Court of Appeals. Rather than separately litigating its own case, the AIW moved to intervene in the *UAW* appellate proceedings, specifically requesting that it be granted "full rights as [a] part[y], including the right to supplement the record . . . and the right to file briefs and to be heard on oral

argument." Motion to Intervene at 6 (Mar. 11, 1988).[1] In support of its motion, the AIW argued to the Seventh Circuit that "permitting the AIW to intervene . . . [would] permit this Court [of Appeals] in *one judicial setting* to hear and decide whether the Employer's [fetal protection policy], which is the identical [fetal protection policy] at all the UAW plants as it is at the AIW plant, is lawful under Title VII." *Id.* ¶ 9, at 4-5 (emphasis added). The AIW also represented to the Seventh Circuit that judicial resources would be saved by allowing intervention because it would be bound by that court's decision in the *UAW* proceedings. *Id.* ¶ 11, at 5.

The Seventh Circuit granted the AIW's motion. Pet. App. 3a. As a result, the AIW supplemented the appellate record in the *UAW* case with record materials from its original district court action, filed full briefs on the merits, and orally argued the merits of the case on two occasions, first before a panel of the Seventh Circuit and later, over the objection of the UAW, before the en banc appellate court. Pet. App. 3a. When the district court learned of this intervention, it stayed the AIW's separate action. Pet. App. 29a.

The Seventh Circuit issued its decision in favor of Johnson Controls in September 1989, *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (CA7 1989) (en banc), and *only* the UAW and related parties requested review by this Court. The AIW did not. Instead, as described by the AIW in its petition, the AIW made a deliberate tactical choice to "prosecute its own action" in the district court *rather than* "seeking review" before this Court. Pet. 16; see also Pet. 16-17 & n.8. In response, Johnson Controls moved the district court to dismiss the AIW's original action on res judicata grounds.

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[1]The AIW had moved to intervene at the district court level in the *UAW* action, but not until two and one-half years after the *UAW* action was commenced and over one and one-half years after the AIW instituted its own action. Pet. App. 2a. The district court denied that motion as untimely. Pet. App. 33a.

The district court granted this motion. The court reasoned that the AIW had achieved full party status by its intervention in the *UAW* appellate proceedings and that the AIW's attempt to persuade the court otherwise "border[ed] on arguing in bad faith." Pet. App. 22a. The court held that, as a party, the AIW was bound by the Seventh Circuit's judgment and, therefore, precluded by the doctrine of res judicata from pursuing the same claim in a separate action. The district court found that the AIW's contrary arguments were particularly "untenable" because of the AIW's "own language in requesting [full party] status." It concluded that the AIW had "been hoisted on its own petard." Pet. App. 20a.

The Seventh Circuit agreed. It emphasized that it had in fact "granted [the AIW] full rights as a party on appeal when [it] allowed [the AIW] to intervene." Pet. App. 5a. Further, the court rejected the AIW's argument that it was not given a "full and fair opportunity" to litigate the merits of its attack on Johnson Controls' fetal protection policy, stating that it had "treated and resolved" all arguments advanced by the AIW on the merits of the case. Pet. App. 6a; see also Pet. App. 4a, 7a. Finally, the Seventh Circuit agreed with the district court's conclusion that a litigant who is allowed to intervene as a full party on appeal is bound, pursuant to the doctrine of res judicata, by the appellate court's judgment.

REASONS FOR DENYING THE WRIT

The AIW's petition for certiorari should be denied for several reasons:

First, this Court has squarely held that a party who does not appeal an adverse judgment cannot benefit from the reversal of that judgment obtained by separate parties who did appeal. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

The Seventh Circuit's application of res judicata in this case is not only consistent with the pronouncements of *Moitie,* it is mandated by them.

Second, the Seventh Circuit's holding that a litigant who intervenes on appeal is bound by the decision issued in those appellate proceedings is consistent with well-established principles of the doctrine of res judicata and intervention developed by this Court and the lower federal courts.

Third, the Seventh Circuit appears to be the first federal court of appeals to directly address the issue of the effect for res judicata purposes of intervention at the appellate level. Accordingly, there is no conflict in the circuits regarding this issue. Further, intervention for the first time in the court of appeals happens so rarely that this case presents an extremely novel issue not likely to recur.

For all these reasons, review in this case is not warranted.

I. THIS COURT'S DECISION IN *FEDERATED DEPARTMENT STORES, INC. V. MOITIE* SQUARELY GOVERNS THIS CASE AND MANDATES THAT THE DOCTRINE OF RES JUDICATA BE APPLIED TO BAR THE AIW'S ATTEMPT TO AVOID THE PRECLUSIVE EFFECT OF THE JUDGMENT THE AIW DELIBERATELY CHOSE NOT TO APPEAL.

Johnson Controls has discontinued its fetal protection policy at all plants, including the one involved here. The sole issue presented by the petition is whether the AIW can obtain retrospective relief for past application of the policy. The AIW argues that the judgment of the Seventh Circuit entered against it in *International Union, UAW v. Johnson Controls, Inc.,* 886 F.2d 871 (CA7 1989) (en banc), does not bar such relief because the decision "has since been reversed by this Court." Pet. 10. This argument ignores two crucial points. First, the AIW chose not to appeal the judgment it is now seeking to avoid. Second, this Court has al-

ready directly held that a party who fails to appeal cannot avoid the application of res judicata when the judgment is reversed on an appeal instituted by other parties to the case.

The AIW's petition makes clear that the AIW made a deliberate strategic decision not to seek review of the court of appeals' judgment in the *UAW* case. The AIW states that it was "cautious" about seeking review "because the legal landscape was at that time far from clear" and because it had "doubt[s]" about whether it "had the necessary control to advance the arguments and proofs that it wanted to make in order to challenge the assumptions of the district court" in the *UAW* case. Pet. 16-17 & n.8. The AIW is apparently saying that it did not seek review because it thought it would lose on the merits before this Court. According to the AIW, because of this concern it *instead* decided to "prosecute its own action which had remained pending before the district court." Pet. 16. Now that the fears that prompted the AIW to make a conscious choice to forego review have proved unfounded, the AIW seeks to reap the benefits of the reversal obtained in the appeal that was pursued by the UAW. However, this Court's decision in *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), prevents the AIW from doing so.

Moitie involved precisely the same situation as here—a litigant who decided not to seek review of a lower court's judgment, but who subsequently attempted to take advantage of a reversal obtained by those who did. In *Moitie,* several groups of retail purchasers filed actions in federal court alleging price-fixing against a number of department stores. These actions were dismissed on the grounds that retail purchasers could not allege an "injury" within the meaning of the federal antitrust laws. *Id.,* at 395-396. Most of the plaintiffs appealed. However, some did not and instead refiled their claims in state court. After the refiled claims were removed to federal court, they were dismissed on the grounds of res judicata. The res judicata judgment was appealed. *Id.,* at 396-397. In the meantime, this Court had issued a decision

holding that a retail purchaser could allege an "injury" sufficient to state a price-fixing claim. In response, the Ninth Circuit Court of Appeals reversed the judgment in the cases that had been appealed on the merits. *Id.*, at 397. It also later reversed the res judicata judgment against the plaintiffs who had failed to appeal the decision on the merits. The Ninth Circuit held that while a "strict application of the doctrine of *res judicata*" would preclude these plaintiffs' separate claims, it was unfair to apply the doctrine when the underlying judgment had been reversed as to other parties. *Moitie v. Federated Dep't Stores, Inc.*, 611 F.2d 1267, 1269 (CA9 1980).

This Court reversed, holding that the Ninth Circuit's decision was "an unprecedented departure from accepted principles of res judicata" and was "all but foreclosed by [this Court's] prior case law." 452 U.S., at 400.[2] This prior case law established that "the res judicata consequences of a final, unappealed judgment on the merits" are *not* "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Id.*, at 398 (citing *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525 (1887)). The Court explained that

> "an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of

[2]The Court also found that the "exception" to the doctrine of res judicata "created" by the Ninth Circuit was in conflict with the decisions of other courts of appeals, which uniformly had held that "an adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issue involved is subsequently rendered in another case." 452 U.S., at 400 n.4 (citing *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1124 (CADC 1976); *Clouatre v. Houston Fire & Casualty Co.*, 229 F.2d 596, 597-598 (CA5 1956); *Appleton Toy & Furniture Co. v. Lehman Co.*, 165 F.2d 801, 802-803 (CA7 1948); *Ripperger v. A.C. Allyn & Co.*, 113 F.2d 332, 333 (CA2), cert. denied, 311 U.S. 695 (1940)).

> their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is *not* open to collateral attack, but can be corrected *only* by a direct review and *not* by bringing another action upon the same cause [of action].' " *Id.*, at 398 (quoting *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325 (1927) (emphasis added)).

The Court also held that equitable considerations should not enter into the decision whether to apply the doctrine of res judicata. Specifically, "[t]his Court recognizes no general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party." *Id.*, at 400. Indeed, the Court held that a party who decides not to appeal is particularly undeserving of the application of any possible "equitable" exception to the doctrine of res judicata. This Court found that the *Moitie* plaintiffs had "made a calculated choice to forego their appeals" and, therefore, they should not "be the windfall beneficiaries of an appellate reversal procured by other independent parties." *Id.*, at 400-401.[3]

The Court concluded that as long as the technical elements of res judicata are present—a final judgment on the merits, involving the same claims and the same parties—res judicata must be applied, even if the judgment is reversed as to other parties based on a subsequent decision of this Court. The Court reasoned that " '[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the

[3]The two Justices who concurred in the judgment also agreed that a party "who makes a deliberate tactical decision not to appeal" should not obtain relief from the doctrine of res judicata because "there is a special need for strict application of res judicata in complex multiple party actions . . . so as to discourage 'break-away' litigation." 452 U.S., at 403 (Blackmun, J., joined by Marshall, J., concurring).

very purpose of the doctrine of res judicata to avert.' " *Id.*, at 398-400 (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

This case is just like *Moitie*. As in *Moitie*, an adverse judgment was rendered against multiple parties. Like some of the plaintiffs in *Moitie*, the AIW made a "calculated choice" not to appeal that judgment and instead attempted to pursue the same claim in a separate action. As in *Moitie*, other plaintiffs appealed and obtained reversal of the judgment based on a change in the law announced by this Court. Therefore, just like the non-appealing *Moitie* plaintiffs, the AIW's "calculated choice" to forego review precludes the AIW from being the "windfall beneficiary" of the reversal obtained by the UAW.

Moitie not only squarely governs this case, it has been uniformly construed by the courts of appeals. See, *e.g.*, *United States v. Lumbermens Mut. Casualty Co.*, 917 F.2d 654, 663 (CA1 1990) (nonappealing parties cannot benefit from reversal of judgment with regard to parties who did pursue an appeal); *In re Fine Paper Antitrust Litigation*, 840 F.2d 188, 194-195 (CA3 1988) (motion for relief from judgment pursuant to Rule 60(b)(6) denied when "only showing" made in support of motion "is that litigants who pursued appellate remedies fared better than litigants who did not"); see also *Erspan v. Badgett*, 659 F.2d 26, 28 (CA5 1981), cert. denied, 455 U.S. 945 (1982) (final, unappealed state court judgment was binding and enforceable despite intervening change in the law); *RSI (India) Pvt., Ltd. v. United States*, 699 F. Supp. 929, 933 (Ct. Int'l Trade 1988) (plaintiffs who did not join in appeal because "'they were unable to bear the additional expense of further litigation'" were not entitled to the benefits of an injunction issued pending appeal on behalf of the appealing plaintiffs). Accordingly, contrary to the AIW's assertions, there is no conflict with the decisions of this Court (or among the circuits) for this Court to resolve.

II. THE SEVENTH CIRCUIT'S HOLDING THAT A PARTY WHO INTERVENES ON APPEAL IS BOUND BY THE COURT OF APPEALS' JUDGMENT IS CONSISTENT WITH WELL-ESTABLISHED PRINCIPLES OF RES JUDICATA AND INTERVENTION.

The AIW attempts to get around the result mandated by *Moitie* by arguing that the doctrine of res judicata should not apply to a party who intervenes for the first time on appeai. The AIW contends that because it did not participate in the *UAW* case until the appellate stage it did not have a "full and fair opportunity to litigate" its challenge to Johnson Controls' fetal protection policy. Pet. 10-11. This argument is legally and factually incorrect.

The issue of whether a party who intervenes at the appellate level is bound by the judgment rendered in those proceedings has never been addressed by this Court or any other court of appeals. However, the Seventh Circuit's affirmative answer to this question is consistent with the general principles governing intervention and res judicata developed by this Court and the lower federal courts.

This Court has explained that "intervenors are considered *parties* entitled, among other things, to seek review by this Court." *Diamond v. Charles,* 476 U.S. 54, 68 (1986) (emphasis added). The lower federal courts have consistently applied this principle. See, *e.g., Schneider v. Dumbarton Developers, Inc.,* 767 F.2d 1007, 1017 (CADC 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."); *United States v. Oregon,* 657 F.2d 1009, 1014 (CA9 1982) (intervenors "enter the suit with the status of original parties"); *Marcaida v. Rascoe,* 569 F.2d 828, 831 (CA5 1978) ("an intervenor is treated as if he were an original party and has equal standing with the original parties"); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.16[6] (2d ed. 1987) ("once

intervention has been allowed the interven[o]r is a party for all purposes").

Concomitantly, the lower federal courts have also held that, because an intervenor gains full party status, the intervenor

> "renders itself 'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.' *United States v. Oregon,* 657 F.2d 1009, 1014 ([9th] Cir. 1981) (quoting 3B *Moore's Federal Practice* ¶ 24.16[6] (2d ed. 1981)). It is said to assume the risk that its position will not prevail and that an order adverse to its interests will be entered." *Schneider,* 767 F.2d, at 1017.

See *United States v. Oregon,* 657 F.2d, at 1014 (intervenors "are fully bound by all future court orders"); *Alaska v. Andrus,* 429 F. Supp. 958, 964 (Alaska 1977) ("[I]t is only [because] the intervenors requested to be allowed into this action that this judgment may be binding on them in the other case."), aff'd on other grounds, 591 F.2d 537 (CA9 1979); *Cartolano v. Tyrrell,* 421 F. Supp. 526, 530 (ND Ill. 1976) ("fact that plaintiff herein entered the previous action as [an] intervenor does not excuse him from the binding effect of that final judgment"); 3B J. Moore & J. Kennedy, *supra,* ¶ 24.16[6] ("The interven[o]r is bound by future orders, unless the intervention has been specially limited.") (footnote omitted).

This conclusion that an intervenor is bound by any judgment rendered in the suit it chose to join is completely consistent with this Court's res judicata case law which holds that a final judgment is binding on all *parties* to the litigation. See, *e.g., Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948) ("when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privities are thereafter bound"); *Baltimore Steamship Co. v. Phillips,* 274 U.S. 316, 319 (1927) ("[i]f upon the same cause of action, the judgment

or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties").

Further, as found by the court below, this conclusion should apply with at *least* equal force to intervention at the appellate level. Courts permit intervention on appeal "only in exceptional circumstances for imperative reasons." *In re Grand Jury Investigation,* 587 F.2d 598, 601 (CA3 1978); see *Amalgamated Transit Union Int'l v. Donovan,* 771 F.2d 1551, 1552 (CADC 1985), appeal dismissed, 475 U.S. 1042 (1986); 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1916, at 456 (2d ed. 1986). To hold that an appellate intervenor can avoid the preclusive effect of the judgment on appeal would render meaningless the extraordinary step of granting appellate intervention.[4]

Here, the AIW knew when it filed its motion to intervene that it would be bound by the Seventh Circuit's decision if its motion were granted. Not only did the AIW request "to intervene with full rights as parties (sic)," the AIW expressly acknowledged in its intervention motion that it *would* be bound by the Seventh Circuit's decision and in fact argued that the motion should be granted *because* of this binding effect.

> "Granting the AIW's motion for leave to intervene . . . would overall result in economizing the expenditure of judicial resources in that the ultimate decision of this Court would necessarily also be dispositive of the AIW's challenge

[4]Neither of the cases cited by the AIW, *Brown v. Felsen,* 442 U.S. 127 (1979), or *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971), even remotely suggests that the doctrine of res judicata should not apply to an appellate intervenor. In *Brown v. Felsen,* this Court held that a judgment in a debt collection action does not bar the debtor from later seeking to discharge that debt in a bankruptcy action. *Blonder-Tongue* involved the doctrine of collateral estoppel, and the Court held that, in certain circumstances, mutuality of parties was not required for *that* doctrine to apply. These cases in no way support the AIW's attempt to carve out an exception to the doctrine of res judicata for appellate intervenors.

> to the [fetal protection policy] in [the AIW's original court action]." Motion to Intervene ¶ 11 (Mar. 11, 1988).[5]

The Seventh Circuit granted the motion and expressly gave the AIW full party status. In its order granting intervention, the court stated that the AIW "may participate in this appeal as an intervening appellant." Pet. App. 5a. Thereafter, the AIW fully participated in the appellate proceedings. As the Seventh Circuit described,

> "[t]here were no limitations placed on [the AIW's] participation in the appeal. [The AIW] was allowed to supplement the record with information obtained during discovery with Johnson. [The AIW] briefed and argued the merits of the fetal protection policy. [The AIW] was listed as a party in the case's judgment. As the district court concluded, [the AIW's] contention that its appearance in the appeal was for a limited purpose is 'patently untrue,' and 'a mischaracterization of [its] role in that action . . . .' " Pet. App. 6a.

See also Pet. App. 5a ("The major portions of [the AIW's] brief and oral argument were devoted to the merits of the fetal protection policy. That is because we granted [the AIW] full rights as a party on appeal when we allowed [the AIW] to intervene."); Pet. App. 20a-22a (in light of the AIW's previous representations to and participation before the Seventh Circuit, its present arguments are "incredible" and "untenable," and "border[ ] on arguing in bad faith").

The full participation by the AIW before the Seventh Circuit belies the AIW's claim to this Court that it did not have a "fair

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[5]In light of all these representations to the Seventh Circuit, the AIW's argument that it was denied due process is specious. The AIW not only had notice that its intervention on appeal carried with it the risks as well as the benefits of full party status, the AIW argued that the motion should be granted for that reason. In any event, the due process issue is not properly before this Court because it was never raised in the court of appeals or the district court. *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 611 (1990); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983).

and full opportunity to litigate" its case through appellate intervention. Further, while the AIW asserts in its petition that the Seventh Circuit did not address the arguments it raised on appeal, the Seventh Circuit has stated that this contention is simply untrue.

> "[The AIW] finally argues that res judicata should not apply because the Seventh Circuit did not address all the arguments it raised in its briefs, and that it was therefore not given an opportunity to fully and fairly litigate its opposition to the fetal protection policy. . . .
>
> "However, . . . [*the AIW's*] *claims were treated and resolved by the Seventh Circuit,* although obviously not to [the AIW's] satisfaction. [The AIW's] suggestion that the court did not address whether 'other alternative acceptable practices and policies . . . could have been followed with far less discriminatory effects on fertile female's right to equal employment opportunities' *is false*. Although we wrote that 'the UAW failed to present facts sufficient for a trier of fact to conclude that less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates . . .', 886 F.2d at 891, that conclusion was necessarily based on the whole record before us, *including evidence put forward by* [*the AIW*]. . . . [*The AIW's*] *claims were raised and addressed,* and now [the AIW] is bound by its decision to become a party on appeal, and by our decision in favor of Johnson Controls." Pet. App. 6a-7a (emphasis added).

Obviously, the Seventh Circuit is in the best position to say whether it fully considered the facts and arguments presented by the AIW. The court of appeals' statement that it *did* cannot fairly be challenged. Thus, not only is the Seventh Circuit's application of res judicata in this case consistent with the decisions of this Court (and the lower federal courts), but the AIW's contention that it did not have a "full and fair opportunity to litigate" its case before the Seventh Circuit is, in the words of both lower courts, "patently untrue." Pet. App. 6a (quoting district court).

III. CERTIORARI SHOULD BE DENIED GIVEN THE UNIQUE FACTUAL AND PROCEDURAL POSTURE OF THIS CASE.

Finally, this case involves very novel factual and procedural circumstances—intervention for the first time on appeal, the entry of an adverse judgment against the intervening appellant, a calculated decision by this unsuccessful intervening appellant not to seek review of the adverse judgment, *and* a reversal of that judgment obtained by other appellants who did seek review. This factual pattern is not likely to recur with any frequency, if at all. This is particularly true because intervention at the appellate level is granted "only in exceptional circumstances." *In re Grand Jury Investigation*, 587 F.2d at 601. Indeed, the "exceptional" nature of appellate intervention explains why there are no other decisions by the federal courts at any level which address the issue of whether an appellate intervenor is bound by the judgment on appeal. There is simply no need for this Court to address this unique issue of first impression at this time. If this factual situation continues to arise *and* a conflict develops in the circuits, the issue can be taken up by the Court at that time.

CONCLUSION

The employees represented by the AIW, like all other employees of Johnson Controls, are entitled to (and are receiving) Johnson Controls' full prospective compliance with this Court's *UAW* decision. For the reasons set forth above, the AIW is not entitled to retrospective relief based on the reversal of a judgment from which it deliberately decided not to seek review. Accordingly, the respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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